IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 498

PARMELEE TRANSPORTATION COMPANY,
A DELAWARE CORPORATION,
Plaintiff

vs.

JOHN L. KEESHIN, ET AL.,
Defendant

IN THE MATTER OF CRIMINAL CONTEMPT OF
THOMAS C. McCONNELL,
Petitioner

BRIEF FOR PETITIONER

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INDEX.

PAGE

Opinions Below 1

Jurisdiction 2

Questions Presented for Review 3

Statute and Rules Involved 4

Statement of the Case 6

Summary of Argument 17

Argument:

I. The part of Specification 6 of the Contempt Order entered against petitioner which the Court of Appeals affirmed does not constitute "Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice" nor does it constitute "Disobedience or resistance to its lawful writ, process, order, rule, decree or command" and so cannot be summarily punished as contempt as a matter of law 19

A. Judge Miner's order abrogating Rule 43(c) of the Federal Rules of Civil Procedure was not a lawful order 21

B. There was no contempt proven against petitioner because there was no obstruction to the administration of justice 30

II. While, as shown, petitioner was not guilty of contempt as a matter of law, insofar as any factual issue was presented, it should have been heard by an impartial judge 32

Conclusion 38

CITATIONS.

Cases.

American Federation of Musicians v. Stein, 213 F. 2d 679 (C. A. 6, 1954) 29

Anderson v. Dunn, 6 Wheat. (U. S.) 204, 5 L. Ed. 242 (1821) 20

Cooper v. Superior Court, 55 Cal. 2d 291, 359 P. 2d 274 (1961) 25, 26, 27

Ex Parte Fiske, 113 U. S. 713, 28 L. Ed. 1117 (1885) 28, 29

In the Matter of Criminal Contempt of Lee A. Freeman, 202 F. 2d 806 (C. A. 7, 1961) 6

Gallagher v. Municipal Court of the City of Los Angeles, 31 Cal. 2d 784, 192 P. 2d 905 (1948) 32

Ex Parte Hudgings, 249 U. S. 378, 63 L. Ed. 656 (1919) 31

Matter of Michael, 326 U. S. 224, 90 L. Ed. 30 (1945) 20

In Re Murchison, 349 U. S. 133, 99 L. Ed. 942 (1955) .. 37

Nye v. United States, 313 U. S. 33, 85 L. Ed. 1172 (1941) 19

Offutt v. United States, 348 U. S. 11, 99 L. Ed. 11 (1954) 34, 35

Parmelee Transportation Company v. John L. Keeshin, et al., 292 F. 2d 794 (C. A. 7, 1961); cert. denied December 11, 1961 (Docket No. 431) 6, 13, 14, 30

Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., et al., 273 F. 2d 896 (C. A. 7, 1960); reversed 364 U. S. 656, 5 L. Ed. 2d 358 (1961) 9, 21

Sacher v. United States, 343 U. S. 1, 96 L. Ed. 717 (1952) 34, 37

Sibbach v. Wilson & Co., 312 U. S. 1, 85 L. Ed. 479 (1941) 29

United States v. United Mine Workers of America, 330 U. S. 258, 91 L. Ed. 884 (1947) 28

Winsor v. Daumit, 179 F. 2d 475 (C. A. 7, 1950) 29

Statutes and Rules.

Act of June 25, 1948, c. 645, 62 Stat. 701, 18 U. S. C. § 401 ..... 4, 19, 20, 30, 31, 37

Act of June 25, 1948, c. 645, 62 Stat. 691, 18 U. S. C. § 202 8

Act of June 19, 1934, c. 651, §§ 1, 2, 48 Stat. 1064, 28 U. S. C. § 723b, 723c, now 28 U. S. C. § 2072 29

Federal Rules of Criminal Procedure, Rule 42 ..... 4, 6

Federal Rules of Civil Procedure, Rule 43(c) 5, 10, 11, 15, 17, 22, 25, 29, 33

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OPINIONS BELOW.

The majority and dissenting opinions of the United States Court of Appeals for the Seventh Circuit, rendered on July 6, 1961, are reported at 294 F. 2d 310 and are printed in the record hereto (R. V, 58-70).

JURISDICTION.

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on July 6, 1961 (R. V, 70-1). A petition for rehearing was denied on October 5, 1961 (R. V, 71). Jurisdiction of this Court is exercised pursuant to 62 Stat. 928, 28 U. S. C. § 1254(1) and Rule 22(2) of the Rules of the Supreme Court of the United States, and by the petition for certiorari filed October 14, 1961, and granted by this Court on December 11, 1961 (R. V, 72).

QUESTIONS PRESENTED FOR REVIEW.

1. Can a lawyer be summarily sentenced for criminal contempt where no obstruction to the performance of judicial duty is shown as required by subsection (1) of 18 U. S. C. § 401, limiting the power of a judge to punish for criminal contempt to "Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice"?

2. Does the provision "Disobedience or resistance to its *lawful* * * * order" as used in subsection (3) of 18 U. S. C. § 401 encompass the attempt of a lawyer to make an offer of proof in exact compliance with Rule 43(c) of the Federal Rules of Civil Procedure by stating, in the face of the trial court's abrogation of that rule, that he, the lawyer, would continue to ask questions in exact accord with that rule unless stopped by a bailiff? (Italics ours.)

3. Can a lawyer be sentenced for criminal contempt under Section 42(a) of the Federal Rules of Criminal Procedure by the judge before whom the contempt was alleged to have occurred where it appears that the Court considered the alleged contempt as a direct attack upon himself and where it was conceded by the sentencing court that no emergency of any kind was present?

STATUTE AND RULES INVOLVED

1. Act of June 25, 1948, c. 645, 62 Stat. 701, 18 U. S. C. § 401, providing in pertinent part:

> "A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—(1) Misbehavior of any person in its presence or so near thereto *as to obstruct the administration of justice;* • • • (3) Disobedience or resistance to its *lawful* writ, process, order, rule, decree or command." (Italics ours.)

2. Rule 42 of the Federal Rules of Criminal Procedure, Rule 42, 18 U. S. C., providing:

> "(a) Summary Disposition. A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.
>
> "(b) Disposition Upon Notice and Hearing. A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the

contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment."

3. Rule 43(c) of the Federal Rules of Civil Procedure, Rule 43(c), 28 U. S. C., providing in pertinent part:

> "(c) Record of Excluded Evidence. In an action tried by a jury, if an objection to a question propounded to a witness is sustained by the court, the examining attorney may make a specific offer of what he expects to prove by the answer of the witness. The court may require the offer to be made out of the hearing of the jury. The court may add such other or further statement as clearly shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon * * *."

STATEMENT OF THE CASE.

Petitioner is a member of the bar of this Court and, as shown by this Court's records, has practiced law for thirty-seven years in the State of Illinois.

The decision of the Court of Appeals was rendered after an appeal by petitioner from an order entered by Judge Julius H. Miner on June 30, 1960, adjudging petitioner guilty of criminal contempt and sentencing him to confinement for a period of ten days on each of three specifications described in the contempt order, said sentences to run concurrently. The contempt order (R. V, 6-11) was entered by Judge Miner under Rule 42(a) of the Federal Rules of Criminal Procedure, and the alleged acts of contempt occurred during the trial of the case of *Parmelee Transportation Company* v. *John L. Keeshin, et al.*, in which case a petition for certiorari was denied by this Court on December 11, 1961 (Docket No. 431).

Of the three specifications for contempt entered by the trial court against this petitioner, two of them, designated as Specifications 5 and 7, were held not to constitute any contempt as a matter of law by unanimous decision of the Court of Appeals and they are not involved here. Four specifications of contempt entered by Judge Miner against petitioner's co-counsel, Lee A. Freeman, were likewise dismissed as not constituting contempt as a matter of law (*In the Matter of Criminal Contempt of Lee A. Freeman*, 292 F. 2d 806 (C. A. 7, 1961)).

The third specification, designated as Specification 6, was affirmed in part by the vote of two of the judges of the Court of Appeals with Judge Duffy, Circuit Judge, dissenting. He said (R. V, 69-70):

"I agree with the majority opinion that the convic-

tions under Specifications 5 and 7 should be reversed. * * *

"I would also reverse as to Specification 6. * * * * * * There was no obstruction in the administration of justice. In my view, the conviction for criminal contempt under Specification 6 should also be reversed."

The majority opinion affirmed the holding of contempt on Specification 6, although reducing the punishment from a jail sentence to a fine of $100.00. As to that, the majority opinion said (R. V, 63):

"As to specification 6, we hold that with the exception of one statement attributed to respondent, nothing with which he is charged has been supported by proof of contumaciousness or disrespect.

"The exception in specification 6, to which we have just referred, charges that respondent said:

"'* * * We don't have a right to read the answers, but we have a right to ask the questions, and we propose to do so unless some bailiff stops us'."

In order to decide the issues presented in this case, it is necessary for this Court to have before it the circumstances preceding and under which petitioner made the above quoted remark.

The action out of which the alleged contempt arose was brought by Parmelee Transportation Company under the federal antitrust laws against John L. Keeshin, Keeshin's company, Railroad Transfer Service, Inc., Hugh W. Cross, former Chairman of the Interstate Commerce Commission, six railroads, constituting a committee chosen by twenty-one railroads comprising all the railroads having passenger terminals in Chicago, and, finally, the presidents of four of these six railroads, to recover damages occasioned by reason of the defendants' violations of the antitrust laws (R. I, 5-8).

It was alleged (R. I, 12-18) and offers to prove were attempted, that in order to switch the transfer contract to carry railroad passengers from and between Chicago railroad terminals from the Parmelee Company, which had performed the service for many years, to a new company to be organized by Keeshin, the defendant, Hugh W. Cross, then a member of the Interstate Commerce Commission, importuned the six defendant railroads to agree with Cross and Keeshin to cause the railroads terminating in Chicago to enter into an exclusive five-year contract with a corporation to be formed by Keeshin, regardless of the cost and terms proposed by Keeshin (R. III, 990-1024, 1042-90).

It was alleged (R. I, 12, 14) and plaintiff attempted to prove that Hugh W. Cross, as a member of the Interstate Commerce Commission, had pending before him matters in which the defendant railroads had financial interests running into millions of dollars (R. III, 996-7, 1003-5) and that Cross acted in violation of his duty as a member of the Interstate Commerce Commission (R. III, 1023) and also in violation of Section 202 of the United States Criminal Code.

The complaint further alleged (R. I, 18) that, as a result of an investigation of his conduct in this regard by the United States Senate Committee on Government Operations, Permanent Subcommittee on Investigations, the defendant, Cross, resigned his position as Chairman of the Interstate Commerce Commission.

Prior to the time Judge Miner was appointed to the bench, the defendants made a motion to dismiss the complaint which was heard and denied by the late Judge Philip L. Sullivan. His opinion is reported at 144 F. Supp. 480.

After approximately three years of discovery proceedings in which thousands of documents were inspected and

reproduced, and thousands of pages of depositions were taken (R. IV, 1733) and at a cost to the plaintiff of many thousands of dollars, the case came on for trial before Judge Miner in the Spring of 1960.

Shortly before the trial was to commence, Judge Miner ordered a separate trial, over the objection of petitioner, of an issue he designated as the issue of public injury, asserting as a precedent therefor the decision of the Court of Appeals for the Seventh Circuit in *Radiant Burners, Inc.* v. *Peoples Gas Light & Coke Co., et al.*, 273 F. 2d 196 (R. I, 389, 432-3). Subsequently, that case was reversed by a *per curiam* decision by this Court (364 U. S. 656, 660, 5 L. Ed. 2d 358, 361 (1961)).

Judge Miner ruled, however, that plaintiff had to show that the public had suffered economic injury before the plaintiff would be permitted to prove the issues set forth in the complaint, which issues were subject to a jury demand filed by plaintiff. Judge Miner said (R. I, 441-2):

> "This is a case where public injury must be established as a prerequisite for sustaining the plaintiff's right to recover. * * * This Court has adopted a rule for the separation of issues and is determined to enforce it wherever lawful and proper. * * * Accordingly, I now order the parties to proceed on the single issue of public economic injury."

Subsequently, the court ruled (R. I, 448) that the issue of public injury "is a separate and distinct issue, and we will rule that any other evidence that is being offered independent and outside of that one issue is irrelevant, immaterial, and not admissible, and improper." Under this ruling, all evidence offered to show a monopoly or a conspiracy was excluded (R. II, 581-2).

Subsequently, Judge Miner told the jury (R. II, 619):

> "I want to explain to the jury there is nothing mysterious about what we are discussing here. The

> Court has limited the issue to one question, whether or not there is public injury, and all I am trying to do here, and I don't want you to be mystified by it or counsel's objections. Each one is protecting their respective interests properly and there is no objection to that * * * I am not going to permit any of the conspiracy on this immediate issue."

The court also said (R. I, 433) that he was dividing up the issues "not to save any time primarily, but to squeeze unnecessary sympathy or prejudice from the trial of the issues where sympathy and prejudice do not belong and have no place therein."

In the face of allegations in the complaint concerning the defendant Hugh W. Cross, the trial of which issues were by jury demand properly before a jury, Judge Miner said (R. II, 727):

> "* * * any conversation with Mr. Cross, any meetings with Mr. Cross, are not part of the issues before me, and are inadmissible and improper * * *."

After the court had so limited the issue to be tried to one of public injury, petitioner offered to stipulate with opposing counsel to the making of offers of proof outside the presence of the jury, thereby obviating the necessity of asking any questions pursuant to Rule 43(c) (R. I, 443-6). This would have made the colloquy and remarks of petitioner assigned as contumacious in Specification 6 unnecessary. This offer was unequivocally refused by defendants' counsel (R. II, 451-2). It was not only refused, but opposing counsel insisted that any offer of proof on the excluded conspiracy issue had to be made in literal compliance with the provisions of Rule 43(c) of the Federal Rules of Civil Procedure. This rule required the asking of a question of a witness in the presence of the jury, the ruling of the court on any objection made to the question and the sustaining of such objection as a

condition to the making of an offer of proof outside the presence of the jury. The late Floyd Thompson, defendants' chief counsel, stated (R. II, 598):

> "* * * We are not going to sit still for a moment and have an offer of proof made that is not directed to a question pending before a witness who is on the stand because that is exactly what the rule says * * *."

Subsequently, in response to objections by defendants' counsel, Judge Miner admonished petitioner's co-counsel, Lee A. Freeman, not to read questions referring to Cross, which Freeman was attempting to ask as a preliminary to an offer of proof (R. II, 731-2).

> "By the Court: It is becoming obvious that the repetition of question after question about the matter on which the Court has ruled is not competent and proper as distinguished from an offer of proof. * * *
>
> "By Mr. Freeman: Excuse me. I have only this problem, as Mr. McConnell has well stated it. The statute controlling in this regard is Section Rule 43(c) of the Federal Rules of Civil Procedure. * * * You will also recall that when we sought to make an offer of proof, for example in the case of Mr. Fencht, who later took the stand, Mr. Thompson objected as did Mr. Owens and Mr. Meserow and Mr. Keating, to the form of the offer. We didn't have a witness there. We were not asking him a question to which there could be an objection. We find ourselves in an uncomfortable position of both being accused of bad form in making the offer of proof and being accused of bad form when we ask the question. I think we have to try to protect our record by asking the question.
>
> "By the Court: I will not object, and I will permit your form of offer of proof in the absence of the jury by overruling their objections to the form. * * *"

Judge Miner was thus stating that he was going to obviate the necessity of asking the questions in the presence of the jury as required by Rule 43(c) of the Federal Rules

of Civil Procedure by overruling defendants' objections based on that rule. Realizing that this would destroy the plaintiff's offers of proof because not made in accord with the provisions of a rule which the court could not waive, petitioner entered the discussion and said (R. II, 732):

> "Their objection is right. They have made a sound objection to proceeding without the witness or without the deposition, and we have to make a record, and your rulings are going to be reviewed."

In this way, petitioner was saying that overruling a valid objection made by defendants' counsel was subject to review and that the trial court's attempt to abrogate the rule did not help the petitioner in making a record for review but, on the contrary, prevented petitioner from making such a record.

There then followed the colloquy assigned as the basis for the contempt designated as Specification 6. Parenthetically, neither petitioner nor his co-counsel, Lee A. Freeman, attempted to go further with this questioning. As Circuit Judge Duffy states in his dissent (R. V, 69):

> "* * * The statement made by McConnell was followed almost immediately by a recess. When the court session was resumed, Mr. McConnell complied with the Court's ruling, and did not persist in asking the particular questions."

Just prior to the recess, the following colloquy occurred between the court and petitioner (R. II, 735):

> "By Mr. McConnell: We have a right to ask these questions.
>
> "By the Court: You have a right to your say, but I have ruled against it, and you may make your record.
>
> "By Mr. McConnell: We can't make the record without asking the questions. That is the point."

Subsequently, petitioner and his client were hamstrung on the appeal by thus being prevented from making an offer of proof. In a formal written opinion filed *sua sponte* by Judge Miner at the end of the case, he said (R. IV, 1750):

> "The complaint also alleges that in order to induce the railroads to vote in favor of Keeshin's proposal, Cross promised to give them favorable consideration on matters pending before the Interstate Commerce Commission, and that he did give them favorable consideration. It is to be observed that these allegations found no support in plaintiff's elaborat offers of proof * * *."

Actually, the offers of proof which petitioner's co-counsel, Lee A. Freeman, was attempting to make at the time of the alleged contempt concerned Cross' participation in the alleged conspiracy (R. II, 719-32). A great many other attempts to offer proof on this conspiracy also were thwarted by the trial court (R. II, 590, 592, 593, 597, 598, 603, 616, 626, 662). The name "Cross" invariably brought an adverse ruling to any offer of proof (R. II, 606, 610, 611, 614, 619, 627, 628, 629, 632, 638, 639, 640, 662, 663, 700, 709, 720, 721, 725, 727, 728, 729, 739, 740).

Not only, as shown above, did the trial court take advantage of deficiencies in the offers of proof which he himself had created, but the majority opinion of the Court of Appeals likewise uses such alleged deficiencies in the offers of proof as the basis for sustaining Judge Miner's dismissal of the *Parmelee* case (292 F. 2d 794, 803-4).

In this state of the record, it is abundantly clear why petitioner felt compelled to insist upon asking questions to preserve his client's right to make offers of proof in accord with Rule 43(c) of the Federal Rules of Civil Procedure.

Prior to the alleged contempt, petitioner had stated to Judge Miner the following (R. II, 586):

> "The rules say how I have to do it, and I am bound by the rules. Your Honor is bound by them and counsel are bound by them, and there is nothing I can do about it."

Later in the trial, Judge Miner expressly conceded that petitioner was right in his position when, in addressing defendants' counsel, he said (R. III, 935):

> "* * * I don't know what you offered to stipulate or what you decline to stipulate except for one thing that I do know: That in the absence of a stipulation, the cases as I read them require the presenting of a witness to ask him some questions, and when I decline to let him answer, then they can proceed with the offer of proof."

To this, defendants' chief counsel replied (R. II, 935):

> "There isn't any question about that. All of us agree with that."

Ironically, it now appears that petitioner did not act with enough resolution, because his failure to proceed with the questions on the Cross issue apparently resulted in both the trial court (R. IV, 1750, 1754-5) and the Court of Appeals (292 F. 2d 794, 803-4) finding fatal deficiencies in petitioner's offers of proof as a reason for dismissing the *Parmelee* suit.

Both the majority and dissenting opinions in effect hold that there was no obstruction to the administration of justice in petitioner's remarks which have been held to constitute contempt.

The majority opinion, in referring to Specification 5, said (R. V, 63):

> "In the case at bar the order from which the appeal was taken contains no finding that respondent's con-

> duct tended to obstruct or continued to obstruct the administration of justice, although we do not base our decision on this omission. Rather we think that its absence strongly indicated that the district court could find no support in the record for such a statement. Actually it appears that the specifications upon which the order was based were not made until several weeks after the trial in question had occurred."

The dissenting opinion states (R. V, 70):

> "Nevertheless, Mr. McConnell did comply with the Court's order. At that point there was no interference with the conduct of the trial. There was no obstruction in the administration of justice."

The majority opinion also says (R. V, 62):

> "* * * We are here concerned with the question of whether respondent as an attorney conducted himself properly in an attempt to represent his client. It was his right as well as his duty to firmly and respectfully advance plaintiff's claims and assert its rights. *In so doing, he had as much right to be in the courtroom and to act as did the judge.* He had a right, when the court ruled that he could not introduce evidence, to make offers of proof thereof, to the end that, in case of an appeal, a proper basis for a review might appear in the record." (Italics ours.)

The sole method of making the record which the Court of Appeals says petitioner had the right and the duty to make is stated in Rule 43(c) of the Federal Rules of Civil Procedure promulgated by this Court. That even the trial court recognized that petitioner was not trying to obstruct the proceedings but was acting in good faith appears from remarks which he made on the record after the incident. He said (R. III, 1109):

> "* * * I have never charged and do not charge now and never will charge any bad faith in this case on the part of plaintiff's lawyers nor on defendants'."

The instant record shows that all petitioner sought to do or stated he was going to do was to ask questions in exact compliance with Rule 43(c) in a situation where he was being whipsawed between objections of opposing counsel and the trial court's erroneous rulings.

The ruling of the Court of Appeals sought to be reversed here, in so far as it holds petitioner in contempt, threatens the destruction of a litigant's right to make a proper offer of proof. Here it has resulted in the dismissal of a suit involving many millions of dollars and involving questions of large public import under the antitrust laws. It is now apparent that under the Court of Appeals' ruling there is no way a lawyer can preserve a record for the review of his client's case if the trial court decides to set aside the Rules of Civil Procedure unless the lawyer is willing to subject himself to a sentence of criminal contempt.

SUMMARY OF ARGUMENT

I.

Recognizing that summary power to punish for contempt is an inroad on the safeguards to liberty guaranteed by the Bill of Rights, Congress limited the power of the federal judiciary to punish for contempt to misbehavior or disobedience of a lawful order which obstructs the administration of justice, and the instant record shows neither disobedience to a lawful order nor an obstruction to the performance of judicial duty. In fact, all it shows is an attempt on the part of petitioner to comply literally with the provisions of Rule 43(c) of the Federal Rules of Civil Procedure, at least until stopped by an unequivocal order of the trial court. It is the contention of petitioner that since he had a right to proceed in accordance with the provisions of such rule, particularly when compliance therewith was insisted upon by opposing counsel, such attempt could not constitute contempt as a matter of law.

All the judges in the Court of Appeals decisions have held as a matter of law that petitioner had a right to make an offer of proof in accord with the rules promulgated by this Court. It is the contention of petitioner that if he had a right to make such an offer, an attempt to so do was not an obstruction to the administration of justice, particularly where, as in the instant case, petitioner's statement subsequently resulted in the decision by the trial judge that petitioner was entitled to comply with the rule.

II.

While petitioner was not guilty of contempt as a matter of law, the record shows that the matter should have been heard by an independent, unbiased and impartial judge. Out of seven citations of contempt entered against petitioner and his co-counsel only one was found by the Court of Appeals to constitute contempt as a matter of law and that one only partially so and in which the sentence was reduced from ten days in jail to a $100.00 fine. It would therefore appear clear that permitting judges to hear matters in which they desire a conviction is contrary to the decisions of this Court, and that a trial before a judge interested in getting a conviction is no trial at all, and that, therefore, this Court, for the protection of the bar, should clearly enunciate the rule that in such circumstances a contempt charge should be referred to a judge who is not interested in the matter, unless immediate action is required to preserve order in the court.

ARGUMENT

I.

THE PART OF SPECIFICATION 6 OF THE CONTEMPT ORDER ENTERED AGAINST PETITIONER WHICH THE COURT OF APPEALS AFFIRMED DOES NOT CONSTITUTE "MISBEHAVIOR OF ANY PERSON IN ITS PRESENCE OR SO NEAR THERETO AS TO OBSTRUCT THE ADMINISTRATION OF JUSTICE" NOR DOES IT CONSTITUTE "DISOBEDIENCE OR RESISTANCE TO ITS LAWFUL WRIT, PROCESS, ORDER, RULE, DECREE OR COMMAND" AND SO CANNOT BE SUMMARILY PUNISHED AS CONTEMPT AS A MATTER OF LAW.

Recognizing that summary power to punish for contempt is an inroad on the safeguards to liberty guaranteed by the Bill of Rights, Congress limited the power of the federal judiciary to punish for contempt. The present statute (18 U. S. C. § 401) reads in pertinent part as follows:

> "A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, *and none other*, as
>
> "(1) Misbehavior of any person in its presence or so near thereto as *to obstruct the administration of justice*; " " ".
>
> " " " " "
>
> "(3) Disobedience or resistance to its *lawful* writ, process, order, rule, decree or command." (Italics ours.)

The history of this statutory provision and the authorities construing it were carefully considered by this Court in *Nye* v. *United States*, 313 U. S. 33, 85 L. Ed. 1172 (1941), where it was held that the statute limited the federal judiciary in contempt cases, to "the least possible

power adequate to the end proposed." *Anderson v. Dunn*, 6 Wheat. (U. S.) 204, 231, 5 L. Ed. 242, 248 (1821). The Court observed that historically the statute included only "that kind of misbehavior which is calculated to disturb order of the court, such as noise, tumultuous or disorderly behavior either in or so near to it as to prevent its proceeding in the orderly dispatch of its business" (p. 50) and further held that "misbehavior" to be considered contumacious had to result in an obstruction to the judicial process. See also *Matter of Michael*, 326 U. S. 224, 227, 90 L. Ed. 30, 33 (1945).

The statute under consideration also limits the power of a court to punish for contempt to "Disobedience or resistance to its *lawful* writ, process, order, rule, decree or command." (Italics ours.)

In the instant case, the Court of Appeals has affirmed a conviction for contempt against petitioner for saying:

> "• • • We don't have a right to read the answers, but we have a right to ask the questions, and we propose to do so unless some bailiff stops us."

It is the contention of this petitioner that the order of the trial court should be reversed because the trial court had no power to summarily punish for contempt unless (a) the order to which petitioner took exception was a "lawful" order and (b) the incident resulted in an "obstruction to the performance of judicial duty." If either of these elements is absent, it is apparent under the decisions of this Court that the court below was in error in sentencing petitioner for contempt.

A. Judge Miner's Order Abrogating Rule 43(c) of the Federal Rules of Civil Procedure Was Not a Lawful Order.

The Court of Appeals incorrectly states petitioner's position when it says "he intended to physically defy the court to the point that only a superior physical force called upon by the court could prevent him from proceeding" (R. V, 64). We submit that that court has missed the entire point to the position taken by petitioner. Denied the right to proceed according to rule, petitioner was entitled to proceed at least far enough for the record to show he was unequivocally stopped by the court. Since petitioner was only threatening to pursue the exact procedure defined by this Court for the making of offers of proof, it would seem self-evident that petitioner's proposed conduct was entirely lawful, at least to the point of creating proof on the record of an unequivocal direction by the court to stop. As pointed out in Judge Duffy's dissent after obtaining record evidence of such direction petitioner "complied with the Court's ruling, and did not persist in asking the particular questions" (R. V, 69). The fact that petitioner used picturesque language in obtaining such record evidence is, we submit, in the circumstances of this case not a threat to physically defy the court but only a threat to do a lawful act—namely comply with the Federal Rules of Civil Procedure unless unequivocally stopped by the Court.

As has been pointed out in the Statement of the Case, petitioner, in attempting to prosecute an antitrust case, had been improperly relegated to the trial of an irrelevant issue (*Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., et al.*, 364 U. S. 656, 660, 5 L. Ed. 2d 358, 361 (1961)) of so-called "public injury." In the face of the trial court's refusal to permit the conspiracy issue to be tried before a jury, petitioner was trying to offer proof of the conspiracy

issue so that the erroneous ruling of the trial judge could be reviewed.

When petitioner attempted to make these offers of proof, he was met with objections of opposing counsel that such an offer of proof could only be made in accord with the exact provisions of Rule 43(c) of the Federal Rules of Civil Procedure. Opposing counsel said (R. II, 598):

> "* * * We are not going to sit still for a moment and have an offer of proof made that is not directed to a question pending before a witness who is on the stand because that is exactly what the rule says * * *."

In the face of this objection, the trial court and petitioner's co-counsel, Lee A. Freeman, engaged in the following colloquy (R. II, 732):

> "By Mr. Freeman: * * * We find ourselves in an uncomfortable position of both being accused of bad form in making the offer of proof and being accused of bad form when we ask the question. I think we have to try to protect our record by asking the question.
>
> "By the Court: I will not object, and I will permit your form of offer of proof in the absence of the jury by overruling their objections to the form."

Judge Miner was thus stating that he was going to obviate the necessity of asking the questions in the presence of the jury as required by Rule 43(c) by overruling the defendants' objections which were based on that rule. At that stage, petitioner, realizing that this would destroy plaintiff's offers of proof because not made in accord with the provisions of the rule, entered the discussion and said (R. II, 732-3):

> "Their objection is right. They have made a sound objection to proceeding without the witness or without the deposition, and we have to make a record, and your rulings are going to be reviewed."

There then followed the remarks of petitioner upon which the contempt conviction is based.

Immediately following these remarks, there was a recess and the following colloquy took place between petitioner and the court (R. II, 734-5):

> "By Mr. McConnell: * * * I am trying to try a lawsuit. I am being prevented from trying it at every stage of it.
>
> "By the Court: It doesn't call for insults or abuse.
>
> "By Mr. McConnell: I am not making any insults.
>
> "By the Court: You certainly do when you say you will have to be dragged out by a sheriff in stopping you from making the proof. I will stop it.
>
> "By Mr. McConnell: There comes a time when a lawyer has to stand up and state his client's case.
>
> "By the Court: And as a gentleman in the bounds of the law.
>
> "By Mr. McConnell: We have a right to ask these questions.
>
> "By the Court: You have a right to your say, but I have ruled against it, and you may make your record.
>
> "By Mr. McConnell: We can't make the record without asking the questions. That is the point."

Previously, petitioner had stated to the court (R. II, 586):

> "The rules say how I have to do it, and I am bound by the rules. Your Honor is bound by them, and counsel are bound by them, and there is nothing I can do about it."

Later in the trial, Judge Miner expressly conceded that petitioner was right, saying (R. III, 935):

> "* * * That in the absence of a stipulation, the cases as I read them require the presenting of a witness to ask him some questions, and when I decline to let him answer, then they can proceed with the offer of proof."

Later, in addressing opposing counsel, Judge Miner tacitly admitted that his order stopping petitioner from

asking questions was not a lawful order. He said (R. III, 957):

> "* * * I have ruled repeatedly, and again I say with due consideration to your table, counsel has offered to stipulate without any witnesses to make offers of proof, without the jury, without requiring a witness to be on the stand. That was rejected. I am not criticizing you. You have your own reasons for rejecting it. You have a right to reject it. *But you have put me in a position now where I can't say to counsel I know what you are going to do, and you can't do it.*" (Italics ours.)

The Court of Appeals, in discussing the incident and the events which preceded it, said (R. V, 61-2):

> "Respondent explained that he was simply laying a basis in the record for an appeal and that he wished to have the record show the offers that he was making.
>
> "He attempted to follow the usual procedure, which consists of putting a question to a witness in the presence of the jury and, when an objection is made, an offer of proof is made out of the presence of the jury. Finally the court admitted that this procedure followed by respondent was required by 'the cases' as he 'read them'. However, later the court struck from the record several offers of proof bearing upon the charges of conspiracy and monopoly, for the reason that these charges had nothing to do with the question of public injury.
>
> "* * * We are here concerned with the question of whether respondent as an attorney conducted himself properly in an attempt to represent his client. It was his right as well as his duty to firmly and respectfully advance plaintiff's claims and assert its rights. In so doing, he had as much right to be in the courtroom and to act as did the judge. *He had a right, when the court ruled that he could not introduce evidence, to make offers of proof thereof, to the end that, in case of an appeal, a proper basis for a review might appear in the record.*" (Italics ours.)

It must occur to this Court that if petitioner was entitled to make an offer of proof as of right and as a duty to his client, he was entitled to make such offer of proof in accord with Rule 43(c), which provides that questions had to be asked of the witness as a preliminary to the offer of proof outside the presence of the jury.

If petitioner was entitled to so proceed as of right, then it necessarily follows that Judge Miner could not lawfully foreclose that opportunity by ordering petitioner to stop asking the preliminary questions. If opposing counsel had been willing to waive the rule, petitioner might properly have been required to follow the court's directions to ask the questions outside the presence of the jury, but such counsel insisted upon a literal compliance with the rule (R. II, 598). *A fortiorari*, under the very statement of the Court of Appeals quoted above, the direction by the trial court not to ask the questions because he, over the objection of opposing counsel, was going to ignore and abrogate Rule 43(c), could not be a "lawful" order. Since, under the express terms of the statute set forth above, only disobedience to a "lawful" order can be contumacious, it must follow that a mere threat to ask questions in compliance with Rule 43(c), which was never carried out, cannot be held to be contumacious conduct.

A recent decision of the California Supreme Court holds that conduct going far beyond that of petitioner did not constitute contempt as a matter of law. The case is *Cooper v. Superior Court*, 55 Cal. 2d 291, 359 P. 2d 274 (1961) which construes a statute almost identical to the federal statute here involved.

In a murder trial (*People v. Finch*), the petitioner, Cooper, acting as the attorney for Finch, was twice adjudged in contempt for disobeying an order of the trial court to refrain from stating in the presence of the jury

an objection to the making by the judge of comments on the comparative credibility of certain witnesses. The judge had on his own initiative recalled the jury from its deliberations for the purpose of reading a prepared statement embodying such comments. Copies of the statement had *not* been furnished to counsel nor had counsel been permitted to participate in its preparation. The petitioner there contended that in the circumstances of that case, the order that he refrain from stating his objection in the presence of the jury was not a "lawful" order of the court and, hence, it was not a contempt for him to disobey it. The California Supreme Court ruled that the contention was sound and that the judgment should be annulled. The court said (55 Cal. 2d at pages 297-8):

> "* * * Petitioner's disregard of the judge's instruction to 'keep seated and wait until the jury is out to make your objections' without more would clearly amount to disobedience of an 'order . . . of the court.' This, petitioner impliedly concedes but, as noted above, he contends that the order was not a 'lawful' one, and hence that it was not a contempt for him to disobey it.
>
> "* * * Petitioner's argument is that 'Since it is the lawyer's duty to make his objections and other points in his client's behalf, it must follow that he is entitled to a timely opportunity to make them. From this it necessarily follows that the judge is without power to foreclose that opportunity by any order or admonition to sit down or to be quiet or not to address the court."

The court, in reversing the contempt conviction, said (55 Cal. 2d at pages 300, 302-3):

> "* * * It is clear that under the circumstances of the case at bench petitioner, if not required to make, was at least justified in presenting, immediate objection to the hereinabove described procedure followed by the judge * * *.
>
> * * * * *

> "* * * It scarcely seems necessary to point out that, when an attorney is presenting an objection or motion in contested litigation he is engaged in a trial, and reasonable opportunity to prepare and present his motion is as fundamental as is the right to counsel * * *.
>
> "* * * on the stipulated record the judge, more than counsel, appears to have set the stage for the contempt adjudications * * *.
>
> "* * * we are convinced that to uphold the contempt order would tend to erode 'the fundamental interest of the public in maintaining an independent bar.'" * * *"

In the instant case, it is quite apparent from both the majority and dissenting opinions of the Court of Appeals that the trial court's action, more than petitioner's, "appears to have set the stage for the contempt adjudications." In the majority opinion, it is pointed out that it was "the correct contention of respondent that public injury was not a relevant issue * * *" (R. V, 60), and that (R. V, 61):

> "* * * [T]he case of *Parmelee* v. *Keeshin, et al.*, was on trial before court and jury when respondent proposed to make offers of proof outside the presence of the jury. Upon defendants' rejection of plaintiff's suggestion, the court ordered the trial to proceed. Respondent stated that the offers would involve proof of the conspiracy and monopoly issues, which he was advised 'will have to be made outside the presence of the jury'. The court responded: 'That is correct. That is my ruling'."

The dissenting opinion states (R. V, 69):

> "I would also reverse as to Specification 6. The majority opinion describes the difficulties the plaintiff's counsel McConnell encountered in trying to preserve his client's rights. The attorneys for plaintiff were driven to a sense of frustration due to the District Court's rulings on offers of proof. Under such circumstances, it is understandable that an attorney might

say things which should not have been said. I think that was the situation in the case at bar.

* * * * *

"It might be noted that counsel's vigorous insistence on preserving his client's rights bore fruit, as the trial judge later changed his ruling."

Against this background and stripped of all collateral contention, we submit that it clearly appears that Judge Miner's order abrogating Rule 43(c) was an unlawful order.

Petitioner's contention was unequivocally stated by the late Mr. Justice Rutledge, when he said in his dissenting opinion in *United States* v. *United Mine Workers of America*, 330 U. S. 258, 351-2, 91 L. Ed. 884, 943 (1947):

"* * * I know of no decision here which holds * * * that a refusal to obey orders or judgments contravening Congress' mandate is criminal or affords cause for punishment as for contempt.

"* * * It would be also in practical effect for many cases to terminate the litigation, foreclosing the substantive rights involved without any possibility for their effective appellate review and determination.

"This would be true, for instance, wherever the substantive rights asserted or the opportunity for exercising them would vanish with obedience to the challenged order."

Here, as we have already pointed out, petitioner's obedience to Judge Miner's directions resulted in the loss of substantive rights of the Parmelee Company, which were foreclosed "without any possibility for their effective appellate review and determination." Cf. *Ex Parte Fisk*, 113 U. S. 713, 727, 28 L. Ed. 1117, 1122 (1885), where this Court said:

"* * * The Circuit Court was, therefore, without authority to make the orders for the examination of petitioner in this case, and equally without authority

> to enforce these orders by process for contempt. * * * Its orders citing him for contempt and committing him to the custody of the Marshal was without jurisdiction and void, and the prisoner is entitled to his release."

In *Sibbach* v. *Wilson & Co.*, 312 U. S. 1, 16, 85 L. Ed. 479, 486 (1941), this Court said:

> "The District Court treated the refusal to comply with its order as a contempt and committed the petitioner therefor. Neither in the Circuit Court of Appeals nor here was this action assigned as error. We think, however, that in the light of the provisions of Rule 37 it was plain error of such a fundamental nature that we should notice it. Section (b) (2) (iv) of Rule 37 exempts from punishment as for contempt the refusal to obey an order that a party submit to a physical or mental examination. The District Court was in error in going counter to this express exemption."

As we have pointed out, Rule 43(c), under which petitioner was attempting to proceed, was promulgated by this Court pursuant to authority delegated by the Congress under the Act of June 19, 1934, Ch. 651, §§ 1 and 2, 48 Stat. 1064 (now 28 U. S. C. § 2072).

The Federal Rules of Civil Procedure have the force and effect of statutes and are just as binding on the court as they are on counsel. See *American Federation of Musicians* v. *Stein*, 213 F. 2d 679, 686 (C. A. 6, 1954); *Wilson* v. *Daumit*, 179 F. 2d 475, 477 (C. A. 7, 1950).

When Judge Miner abrogated the rule and denied petitioner the right to comply with it, petitioner was whipsawed between the judge's unlawful ruling and the objections of defendants' counsel, and his client's right to make a record on appeal was destroyed. Obviously, a direction which brings about such an untoward result is not a lawful order.

As we have pointed out above, both in the trial court

(R. IV, 1750, 1754-5) and in the Court of Appeals (292 F. 2d 794, 803-4) omissions in petitioner's offers of proof were utilized to justify a dismissal of the *Parmelee* suit. These omissions were occasioned by the trial court's refusal to permit petitioner to make proper offers of proof within the rule.

The reason for the limitation on the power of a federal court to punish resistance to its orders to that of a "lawful" order thus becomes manifest and its justice apparent. In the instant case, petitioner, as we later show, did not actually resist the order beyond the point of drawing an unequivocal direction from the court when the court said, with reference to petitioner's attempt to ask preliminary questions, "I will stop you now, * * *" (R. II, 733).

B. There Was No Contempt Proven Against Petitioner Because There Was No Obstruction to the Administration of Justice.

The Court of Appeals agreed with petitioner that an obstruction in the performance of judicial duty must be shown. It said (R. V, 62-3):

> "* * * Power to punish for contempt is one which must be used sparingly and only when it is clearly demonstrated that the respondent's conduct is contumacious and tends to bring the administration of justice into disrepute, rather than when his conduct is that of a determined level-headed practitioner who is acting respectfully to the court under considerable pressure in a lengthy and important trial.
>
> "18 U. S. C. A. § 401 provides:
>
> "A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

"(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

* * * * *

"In *Ex Parte Hudgings*, 249 U. S. 378, 383, the court said:

> "'An obstruction to the performance of judicial duty resulting from an act done in the presence of the court is, then, the characteristic upon which the power to punish for contempt must rest. This being true, it follows that the presence of that element must clearly be shown in every case where the power to punish for contempt is exerted * * *'

"In the case at bar the order from which the appeal was taken contains no finding that respondent's conduct tended to obstruct or continued to obstruct the administration of justice, although we do not base our decision on this omission. *Rather we think that its absence strongly indicated that the district court could find no support in the record for such a statement.*" (Italics ours.)

Circuit Judge Duffy in his dissenting opinion says (R. V, 70):

> "Nevertheless, Mr. McConnell did comply with the Court's order. At that point there was no interference with the conduct of the trial. There was no obstruction in the administration of justice. In my view, the conviction for criminal contempt under Specification 6 should also be reversed."

In describing the setting for petitioner's remarks, Circuit Judge Duffy said (R. V, 69):

> "* * * McConnell's statement occurred during the reading of the deposition of Howard E. Simpson, president of the Baltimore & Ohio Railroad. Simpson was a defendant. One of plaintiff's attorneys was reading portions of Simpson's adverse examination

> to lay the foundation for an offer of proof. The statement made by McConnell was followed almost immediately by a recess. When the court session was resumed, Mr. McConnell complied with the Court's ruling, and did not persist in asking the particular questions."

It thus appears from the decisions of the Court of Appeals that all three judges, after an exhaustive examination of the trial court record, found no "obstruction to the administration of justice." In view of this, we most respectfully submit that under the limitations of the federal statute and the decisions of this Court construing the statute, Judge Miner had no authority or warrant to convict this petitioner of criminal contempt.

II.

WHILE, AS SHOWN, PETITIONER WAS NOT GUILTY OF CONTEMPT AS A MATTER OF LAW, IN SO FAR AS ANY FACTUAL ISSUE WAS PRESENTED, IT SHOULD HAVE BEEN HEARD BY AN IMPARTIAL JUDGE.

As we have heretofore pointed out, if Judge Miner's order to which petitioner took exception was unlawful, there could be no contempt as a matter of law. However, if this Court should hold that such order was lawful and that petitioner's conduct constituted an obstruction of justice, there would still remain the issue of whether petitioner was acting in good faith in an effort to protect the rights of his client.

As stated in the case of *Gallagher* v. *Municipal Court of the City of Los Angeles*, 31 Cal. 2d 784, 788, 192 P. 2d 905, 908-9 (1948):

> "* * * [A] mere mistaken act by counsel cannot render him in contempt of court. Even if a legal proposition is untenable, counsel may properly urge it in good faith. * * *"

In the instant case, petitioner still sees no way in which he could have made a record on appeal when denied the procedure set forth in Rule 43(c) unless permitted the right to stand his ground against a hostile ruling. As petitioner said to Judge Miner (R. II, 586):

> "The rules say how I have to do it, and I am bound by the rules. Your Honor is bound by them, and counsel are bound by them, and there is nothing I can do about it."

If petitioner was wrong in his statement that the trial judge was bound by the rules, still the question remains as to how he was going to make a record for his client. If he acted in good faith, it is difficult to see how he could be in contempt. Even Judge Miner did not question petitioner's good faith. He said (R. III, 1109):

> "I have never charged and do not charge now and never will charge any bad faith in this case on the part of plaintiff's lawyers nor on defendants'."

In this situation, it would seem apparent that Judge Miner should never have dealt summarily with this matter unless some emergency was shown. The record completely negatives any such showing.

At the end of the Parmelee trial, Judge Miner orally stated that he was holding petitioner in contempt for making "direct attacks on the Court" (R. IV, 1718). At the same time, he said, "There is no emergency about it" and postponed the imposition of sentence for six weeks to June 30, 1960 (R. IV, 1718). The order and certificate entered at that time represented the first time any specifications were charged against petitioner (R. V, 6-11). As the Court of Appeals said (R. V, 63):

> "* * * Actually it appears that the specifications upon which the order was based were not made until several weeks after the trial in question had occurred."

In the court below, petitioner urged, as he had before Judge Miner (R. V, 11-19), that this matter should have been referred to an impartial judge. The Court of Appeals overruled this contention and held that the trial court did not have to send the case to the Executive Committee for reassignment and in effect held that the rule in *Sacher* v. *United States*, 343 U. S. 1, 96 L. Ed. 717 (1952), is the law and is not modified by this Court's decision in *Offutt* v. *United States*, 348 U. S. 11, 99 L. Ed. 11 (1954). The Court of Appeals in refusing to follow the *Offutt* case, said (R. V, 67):

> "In the present appeal, while what we have said herein has not been in entire approval of the conduct of the district court, we do not find that he was personally involved in controversy with the respondent or that in his rulings leading to the orders appealed from he was actuated by personal enmity toward either of the lawyers held in contempt. Accordingly we do not feel that the *Offutt* case requires that upon the record before us there should be a remandment for retrial before another judge."

This statement shows that the Court of Appeals has failed to comprehend the rationale of the *Offutt* case. With all due deference to this Court, we believe this to be that whenever (a) there is no emergency and (b) the trial court believes he has been under direct attack by a lawyer, he should not be permitted to hear the contempt issue himself. We believe a fair reading of the *Offutt* case compels this conclusion.

As we have pointed out, both the elements required are present here. That in the instant case there was no necessity for immediate punishment to prevent "demoralization of the court's authority before the public" is conclusively shown from the following colloquy which occurred during the trial between the court and petitioner (R. II, 591):

"By Mr. McConnell: If your Honor tells me I can't

> do something, I am not going to get in contempt of court just to be funny about it.
>
> "By the Court: Oh, no, I never dreamed of anything like that—."

and, again, when the court said (R. III, 1035):

> "I have not said it is in bad faith. I think I have defended your position by saying as long as you are offering it on that label, I have no choice but to accept it, and it is in good faith, and I will tell you why it is in good faith. It is your honest contention, and I recognize it, that public injury embraces that type of evidence, and I am in no position at this time to say yes or no * * *."

The court further said (R. III, 1110):

> "I want to say this also, that you and I differ so clashingly on what is the law of antitrusts. * * * I disagree with it, and I will so state in my opinion. There has to be more than that. There has to be within the interpretation of Congress and this is not it. We have an honest disagreement."

It can be seen from the above that not only was there no conduct which it was necessary to punish immediately, but that the comments of the trial judge concede that the positions which petitioner had taken were positions which were proper and within the limits of a lawyer's responsibility to his client and to the court.

In the instant case, there are other considerations which require a statement by this Court that the rules set out in the *Offutt* case should have been followed. Here, four specifications of contempt against Lee A. Freeman, petitioner's co-counsel, and two specifications against this petitioner, were found by the Court of Appeals not to constitute contempt as a matter of law. On the one specification affirmed by the Court of Appeals, there was a strong dissent by a former Chief Judge of the Court. We can only assume that if the case had been reassigned to another

trial judge, who had no bias or interest in the matter, the contempt at least would have been limited to what is presented here.

Further, the trial judge wrote a diatribe, unsupported by a single record reference, in which he castigated petitioner by saying (R. V, 7):

> "* * * both attorneys for the plaintiff herein, embarked upon a course of unprofessional, unethical, intimidating, insulting, defiant, unfair and improper behavior, to foist their will upon the Court and jury and to dominate the course of procedure herein without regard to an honest and impartial administration of justice."

The Court of Appeals said (R. V, 68):

> "Inasmuch as the court's order must stand or fall on the specifications, the language in the preface is unimportant * * *."

While it may be unimportant to the Court of Appeals, this Court must realize that such unjustified language, not supported by the record, assumes considerable importance in the professional standing of a practicing lawyer. The trial court's remarks were given widespread newspaper publicity. The harm done can no more be reversed than a "blown horn can be unblown". While what has happened to petitioner is probably of no great moment, at this late stage in his career, still what he has experienced in the instant case should not be permitted to happen to other members of the bar who may have most of their professional lives ahead of them.

The instant proceeding took another novel turn. Obviously, Judge Miner regarded the whole contempt proceeding as personal to him for at the time he imposed the ten-day jail sentence on petitioner and his co-counsel, he stated (R. IV, 1722):

> "I will enter my own motion for suspension of it, if you folks will decide to enter or file a petition of retraction and apology."

Such an apology would have admitted guilt to charges of criminal contempt, *six of which were dismissed by the Court of Appeals as not constituting contempt as a matter of law.*

The statute which authorizes punishment for contempt (18 U. S. C. § 401) says that a contempt may be punished by either fine or imprisonment. There is no provision in that statute that an attorney may be humiliated by a forced apology for something he did not do under the threat of a jail sentence. Compromising the good standing of a member of the bar and destroying a plaintiff's case, as was done in this instance, obviously brings the entire judicial process into disrepute.

If the rule of the *Offutt* case had been applied here, this result could never have occurred. We submit that the self-respect of the members of the bar and the dignity of the courts are involved in this issue because *a trial before a judge interested in getting a conviction is no trial at all (In Re Murchison*, 349 U. S. 133, 99 L. Ed. 942 (1955)).

The end result of Judge Miner's order to which petitioner took strenuous exception was not only an invasion of petitioner's rights, but, as we have pointed out above, it obviously prejudiced and destroyed the client's case. This Court said in *Sacher* v. *United States*, 343 U. S. 1, 13, 96 L. Ed. 717, 726 (1952):

> "* * * But that there may be no misunderstanding, we make clear that this Court, if its aid be needed, will unhesitatingly protect counsel in fearless, vigorous and effective performance of every duty pertaining to the office of advocate on behalf of any person whatever."

We most respectfully submit that the instant record presents a case where such aid should be granted.

CONCLUSION

As we have pointed out in the petition for certiorari, a serious question in the administration of justice in the United States courts is presented here. The instant record shows in a dramatic way the effect on a client's rights of the denial of a lawyer's right to make a record on appeal pursuant to rules promulgated by this Court.

Here, the lawyer's client was not only denied due process of law, but the petitioner was sentenced to jail for attempting to make for his client a proper record on appeal. Such procedure not only destroys a litigant's rights but will result in the destruction of an independent bar.

We submit that the conviction for criminal contempt under Specification 6 should be reversed.

Respectfully submitted,

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JOHN F. DAVIS, CLERK

No. 498

In the Supreme Court of the United States

OCTOBER TERM, 1961

IN THE MATTER OF CRIMINAL CONTEMPT OF THOMAS C. McCONNELL, PETITIONER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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